

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

RHINO NORTHWEST, LLC

and

**Cases: 19–CA–221309
19–CA–221359**

**LOCAL NO. 15, INTERNATIONAL ALLIANCE
OF THEATRICAL STAGE EMPLOYEES AND
MOVING PICTURE TECHNICIANS, ARTISTS,
AND ALLIED CRAFTS OF THE UNITED STATES
AND ITS TERRITORIES AND CANADA,
AFL-CIO, CLC**

Elizabeth Devleming, Esq., for the General Counsel.

Timothy A. Garnett, Esq. and Heidi K. Durr, Esq.,
(*Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*)
for the Employer.

Laura E. Ewan, Esq. and Carson Phillips-Spotts, Esq.,
(*Barnard Iglitzin & Lavitt, LLP*) for the Union.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether Rhino Northwest, LLC (Respondent or Rhino) violated Section 8(a)(1) & (5) of the Act by: (1) implementing a policy requiring bargaining unit employees to wear a certain type of protective shoes without first notifying and bargaining with Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, Its Territories and Canada, AFL–CIO, CLC (Union or Local 15); (2) failing and refusing to meet with the Union to bargain on a regular basis; (3) failing and refusing to meet with the Union for an appropriate amount of time to bargain; (4) failing and refusing to engage in meaningful bargaining during negotiations with the Union; (5) failing and refusing to come to bargaining sessions with the Union with prepared proposals; and (6) insisting that the Union is a competitor of Respondent despite Board decisions finding it to be a labor organization.

I. PROCEDURAL BACKGROUND

Based on charges in Cases 19–CA–221309 and 19–CA–221359 filed by the Union on June 1, 2019, and an amended charge in Case 19–CA–221359 filed by the Union on July 31, 2018, the Regional Director for Region 19 of the Board issued a consolidated complaint on August 22, 2018, alleging that Respondent had violated the Act by engaging in the above-described conduct during the period between January 1, 2018 and July 12, 2018.¹ Respondent filed a timely answer, denying the substantive allegations of the complaint. I presided over this case in Seattle, Washington, from December 10 through December 13, 2018.

II. JURISDICTION AND LABOR ORGANIZATION STATUS

The complaint alleges, and Respondent admits, that it is an Arizona limited liability corporation with an office and place of business in Fife, Washington, where it is engaged in the business of providing event labor staffing services. The complaint further alleges, and Respondent admits, that in conducting its business operations, during the 12 months preceding the issuance of the complaint, a representative time period, Respondent has derived gross revenues in excess of \$500,000, and during the same time period it has provided services valued in excess of \$50,000 to customers located in states other than the State of Washington. Accordingly, I find that at all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FINDINGS OF FACT

A. *Background Facts*

Many, and perhaps most of the facts in this case are not truly in dispute, and indeed the General Counsel, Respondent and the Union entered into a Partial Stipulation of Facts that was admitted into the record as Joint Exhibit 1 (Jt. Exh. 1). This exhibit in turn incorporates by reference numerous documents, admitted as Joint Exhibits 2 through 124, which in essence tell the story of the case, including, inter alia, letters and emails exchanged between the parties (i.e., Respondent and the Union), bargaining proposals and bargaining notes made by both parties, and other miscellaneous items, many of which require little, if any, explanation—but which will be explored in more detail below.

As briefly described above, Rhino provides labor, primarily consisting of riggers, stagehands, and truck loaders, and related production services (lights, audio and video) for concerts, sport and corporate events, and trade shows in different venues throughout the Pacific

¹ During the hearing, as will be discussed below, the General Counsel made a motion to amend the pleadings to conform to the evidence adduced during the proceedings, in essence expanding the scope of the complaint to include conduct engaged in by Respondent through the date of the motion, December 12, 2018 (Tr. 514–517). As discussed more fully below, I granted the motion.

Northwest. Jeff Giek, who is based in San Diego, is Respondent’s CEO and founder, and Michelle Smith, who is based in Las Vegas, is its Regional Director of Operations.² Based on a petition filed by the Union on May 26, 2015 in case 19–RC–152947 (Jt. Exh. 2), the Regional Director for Region 19 issued a Decision and Direction of Election on June 18, 2015 (Jt. Exh. 3), directing that a representation election be held among a unit of riggers employed by Respondent.³ Following an election, the Acting Regional Director certified the Union as the collective-bargaining representative of said unit of employees on August 3, 2015 (Jt. Exh. 4), a certification upheld by the Board on December 17, 2015, following Respondent’s appeal to the Board. *Rhino Northwest, LLC*, 363 NLRB No. 72 (2015). Respondent appealed the Board’s decision to the United States Court of Appeal for the DC Circuit, which upheld the Board’s decision, granting the Board’s cross-application for enforcement of its order on August 11, 2017 (Jt. Exh. 5). For reasons that are unclear, the court did not issue its mandate until October 3, 2017 (Jt. Exh. 6).

Following the issuance of the court’s mandate, on December 6, 2017, Andrea Friedland (Friedland), a business representative of the Union, sent a letter to Respondent’s CEO, Jeff Giek (Giek) requesting bargaining. The letter, which was also attached as an email to Giek, also requested that Respondent provide the Union with specified information regarding, inter alia, wages, benefits and other working conditions of the bargaining unit employees. (Jt. Exh. 18). By letter dated January 3, 2018, though its counsel Timothy Garnett (Garnett), Rhino responded to the Union’s bargaining and information request, suggesting January 29, 2018, as a bargaining date, and stating that it would discuss the Union’s information request during their first bargaining meeting (Jt. Exh. 19).⁴ On January 5 the Union, through Friedland, responded via email, stating that it was unavailable for bargaining on January 29, and suggesting various dates on the following week, namely on February 6, 8 or 9, as well as the afternoon of February 7. In its email, the Union also reiterated that it needed the requested information in advance of the first bargaining session in order to prepare for negotiations and requested that the information be provided by January 16—6 weeks after the information was first sought (Jt. Exh. 20). On January 9, Garnett responded via email, indicating Rhino’s availability to bargain on February 9, one of the dates proposed by the Union. The email also informed that Rhino’s representatives would be flying in that morning (into Seattle, the site of the negotiations), and requesting 11 a.m. as the starting time and 4 p.m. as the time to finish, since the representatives had to fly home that same evening. The email did not address the Union’s information request (Jt. Exh. 21). Friedland, for the Union, responded on the same date (January 9) via email, agreeing to the date (February 9) and times proposed by Rhino. Friedland also suggested that “everyone” should bring their calendars “so we can schedule additional multiple dates” when they met on February 9. (Jt. Exh. 22). On January 22, Garnett emailed Friedland, confirming the location of

² Rhino is apparently related to, or part of, a corporate entity that has offices throughout the country, not just the Pacific Northwest, where the Respondent in this case operates. Accordingly, as Regional Director of Operations, Smith is in charge of 10 offices throughout the country, including the one in Fife, Washington.

³ The Regional Director found the following unit of employees to be appropriate for collective bargaining: All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the Act.

⁴ Henceforth all dates shall be in calendar year 2018, unless otherwise indicated. Respondent’s letter, which was sent to the Union via U.S. Mail as well as by fax, also suggested that all further communications be via emails.

the meeting on February 9 and the starting time of 11 a.m. The email also stated, “we are working on your information request” (Jt. Exh. 24). On January 31, Garnett sent an email to Friedland which attached much, but not all, of the information requested by the Union. Among the information sought by the Union which was not provided was the work locations where Rhino employed riggers, which the email explained was considered “confidential and proprietary information,” suggesting that the Union was a “competitor” of Rhino (Jt. Exh. 28).⁵ On February 2, Friedland responded to Garnett’s January 31 email, in essence disagreeing with Rhino’s characterization of the Union as a competitor to Rhino and requesting, inter alia, legal authority in support of such contention. Friedland expressed disappointment at Respondent’s posture with regard to the information being withheld, and lamented that things were off to such a poor start on the eve of the start of negotiations (Jt. Exh. 29).⁶ On February 5 Garnett sent Friedland an email seeking confirmation of the 11 a.m. starting time for the February 9 bargaining meeting and informing her that he had a 4:20 p.m. flight out of Seattle that afternoon (Jt. Exh. 30).⁷ On the same day, Friedland responded to Garnett’s email, confirming a starting time of 11 a.m., and the location of the meeting.

B. The Bargaining Meetings and Communications between Meetings

The parties had their first bargaining session on February 9, starting shortly after 11 a.m., as previously agreed to.⁸ Present for the Union were Chris “Radar” Bateman (Bateman), who was the Union’s lead negotiator; Friedland, who was the Union’s main note-taker; Sal Ponce, the Union’s president; Kyle Daley and Brian West, members of the Union (Local 15); Rose Etta Venetucci, a business representative of IATSE Local 28 (a sister local from Portland); Nicholas Morales, a member of Local 28; Sandra Englund, an International representative for IATSE; and Dmitri Iglitzin, the Union’s counsel. Present for Rhino were Garnett, its counsel and lead negotiator; Giek, its CEO; Michelle Smith, Regional Director of Operations, Nevada; James Acuna, Regional Director of Operations, Colorado; and Travis Medley, Director of Rigging.

According to the testimony of Friedland and based on her bargaining notes (Jt. Exh. 7), shortly after the meeting began, the Union submitted its proposal regarding the “ground rules”

⁵ Since Respondent’s failure to provide, or delay in providing, information to the Union is not alleged as a violation in the complaint, I see no need to discuss in detail the items that were or were not produced, which were the issues alleged in another charge not covered by the instant proceedings. Respondent’s assertion that the Union was its “competitor,” however, is alleged as evidence of bad faith in negotiations, and therefore is discussed above to provide context for events that transpired later.

⁶ The email also discussed other issues not germane to the instant case.

⁷ I note that the timing of Garnett’s 4:20 p.m. flight out of Seattle would thus appear to preclude meeting until 4 p.m., as Garnett had suggested in his earlier email on January 9 (see, Jt. Exh. 21).

⁸ The parties met on the same building where the Union’s offices are located in Seattle, but on a different suite.

for the negotiations, which in essence set forth procedural and conduct guidelines for the negotiations (See, Jt. Exh. 33).⁹ Garnett requested that all proposals be submitted electronically on Word (for Windows) format, so that the parties could make modifications and changes that could be tracked. Bateman summarized the proposed ground rules, and Garnett stated that Rhino would have “a problem” agreeing to some of them. The parties broke to caucus separately at 11:29 a.m., and a couple of minutes later, Friedland emailed Garnett an electronic copy of the Union’s proposed ground rules.¹⁰ At 12:55 p.m., Garnett emailed Friedland a copy of Rhino’s counter-proposal regarding these rules (Jt. Exh. 34), and about 15 minutes later, the Union signaled that it was ready to meet again at the bargaining table, which the parties did a few minutes later, at 1:19 p.m. A discussion followed about Rhino’s counter-proposal regarding the ground rules, primarily its proposal that bargaining be conducted about non-economic issues first, and its proposal that the parties meet at reasonable times and places mutually agreed, rather than meeting at least 3 times per month, as the Union had proposed. The parties agreed on a couple of the ground rules but not on the others. A discussion then ensued about what time Garnett needed to leave for the airport (in light of his 4:20 p.m. flight). The Union proposed to meet again on the week(s) of February 26, March 5, March 19 and March 26. The parties broke to caucus at 1:37 p.m., and at 2:25 p.m. Rhino sent the Union (Friedland) a revised proposal regarding the ground rules, and printed copies were distributed to all the participants. The Rhino team offered March 29 as the next bargaining date, and then departed at 2:28 p.m.¹¹ No “substantive proposals,” that is, collective-bargaining contract proposals, were discussed during this meeting, as the meeting was devoted mostly to discussing the proposed ground rules for bargaining.

Five days later, on February 14, Friedland emailed Garnett informing that the Union agreed with all of the items in Rhino’s counter-proposal regarding the ground rules, except for the issue of the location of the bargaining sessions. It also agreed with Rhino’s proposed date of March 29 for the next bargaining session but added that the Union was available for earlier dates if Rhino was available (Jt. Exh. 37). On February 28, Friedland again emailed Garnett, advising that the Union had not received a response to either an email sent on February 8 (requesting information) or the attached email of February 14, as described immediately above. Friedland additionally stated that the Union would like to schedule more—and multiple—bargaining

⁹ My description of the events that transpired during the February 9 bargaining session, as well as those in the other bargaining sessions that will follow, is based primarily on the testimony of Friedland and the content of her bargaining notes, as well as the testimony and bargaining notes of Garnett, and to a lesser extent, the testimony of Smith—the only persons who testified about the bargaining sessions. These events are not truly in dispute, with one notable exception that will be discussed below. I note that Friedland’s bargaining notes, which are in evidence, consist of her contemporaneous handwritten notes and the typewritten version of these notes, transcribed shortly after the sessions. To the extent that there is any discrepancy between Friedland’s oral testimony and her bargaining notes, I will generally credit the notes, which were contemporaneous with the events and thus not at the mercy of recollection. Finally, it should be noted that my description of the bargaining sessions consists of a summary of the salient events that occurred, not a word-by-word rendition of everything that was said or everything that transpired during the sessions.

¹⁰ It is not clear, from either Friedland’s testimony or her bargaining notes, whether this caucus was requested by Rhino or the Union, or jointly requested.

¹¹ Prior to departing, in 2 emails clocked at 4:14 p.m. and 4:25 p.m. Central time (the location of Garnett’s email server) or 2:14 p.m. and 2:25 p.m. Pacific time, Garnett informed Friedland that Rhino had accepted further modifications to the ground rules made by the Union, except for the issue of location, and proposing March 29 as the next meeting date (Jt. Exhs. 35; 36)

sessions in addition to March 29, indicating the Union was available on the weeks of April 2 and April 9, except for limited time periods during those 2 weeks (Jt. Exh. 38). Garnett did not respond to this email, so on March 20 Friedland again emailed Garnett, stating that the Union had not received any response to its emails of February 8, 14, or 28. Friedland requested that

5 Garnett confirm the March 29 bargaining date, and again requested that Rhino provide additional bargaining dates during the first 2 weeks of April (Jt. Exh. 39). Later that day, Garnett replied by email to Friedland, confirming the March 29 bargaining date and adding that he needed to check with his client—when he returned to St. Louis (the location of his office)—regarding additional bargaining dates (Jt. Exh. 40). Friedland responded that same day, stating that the Union looked

10 forward to hearing from him, adding “see you on the 29th” (Jt. Exh. 41). On March 28, Garnett emailed Friedland, providing and discussing some of the information the Union had requested weeks earlier. At the end of the email, Garnett stated “We can also discuss future bargaining dates tomorrow” (Jt. Exh. 42).

15 On March 29, the parties had their second bargaining session, starting shortly after 11 a.m.¹² At the beginning of the meeting, the Union proffered a comprehensive contractual proposal (Jt. Exh. 43), but before any discussions about this proposal were held, the parties appear to have spent about 35–40 minutes discussing the Union’s information request. These discussions were centered on the items yet to be provided by Rhino or on items provided that

20 needed some clarification and explanation. Some of the discussion also involved Rhino’s claim that the information regarding the locations or venues where it worked was proprietary and confidential, and about the nature and identity of employers to whom the Union referred riggers through its dispatch hall. The parties broke for a caucus from 11:40 a.m. to 12:14 p.m., then returned to the table.¹³ Upon their return, the discussion turned to the Union’s comprehensive

25 contractual proposal, with the Union (primarily through its main negotiator, Bateman), discussing it article by article, and Rhino asking questions or making comments about these. This discussion lasted over an hour, until the parties broke to caucus. Before breaking to caucus, however, the Union inquired about future bargaining dates, which Garnett had earlier promised to discuss during this session. Garnett stated that Jeff (Giek, Rhino’s CEO), was “not available”

30 during April, and that they would take a look at dates in May. The parties broke to caucus from 1:36 p.m. until 3:06 p.m. and during that time Rhino emailed the Union a copy of its proposed confidentiality agreement (Jt. Exh. 44). Upon returning to the bargaining table, the Union indicated it needed additional time to study Rhino’s proposed confidentiality agreement, again reiterating that the Union did not represent employers, but rather represented employees who

35 were dispatched to employers. The discussion then turned to future bargaining dates, and the Union offered to meet May 1 and 2, May 6 through May 13, suggesting they were available to meet Saturdays and Sundays, and also suggesting that it would be helpful to schedule 2–3 dates

¹² Present for the Union were some of the same individuals present at the February 9 session: Bateman, Friedland, Daley, West, Venetucci, Morales and Iglitzin; new attendees were Tim Dawson, Lisa Yimm and Ian Wright of IATSE Local 28. Present for Rhino were Garnett and Giek.

¹³ While Friedland’s bargaining notes regarding this session (Jt. Exh. 8) are not clear as to which side requested this particular caucus, Garnett testified that it was at the Union’s request (Tr. 578). It should be noted that Friedland’s bargaining notes for each bargaining session, including the March 29 session, denote the total amount of time devoted to actual bargaining at the table versus the time spent on caucusing. For example, for the March 29 session, Friedland’s notes reflect that the total session lasted 4 hours and 14 minutes, and that 2 hours and 16 minutes of this was spent caucusing. The notes, however, often fail to reflect which side requested a caucus, or whether it was done bilaterally.

out. Garnett responded that Giek was not available May 9 through the 11, or on May 13. He then stated that they would get back to the Union about future dates, hopefully by the following day. The session ended at 3:14 p.m. because Rhino's team was returning home that evening.

5 That evening Friedland emailed Garnett, to reiterate the Union's point that it did not represent employers and entities with whom Rhino competed against. The email also stated that the Union would review the confidentiality agreement proposed by Rhino and would respond (Jt. Exh. 46). Garnett responded via email the next day, March 30, expressing puzzlement at the Union's need to state that it did not represent employers (Jt. Exh. 47). On the same day,
10 March 30, Garnett emailed Friedland to indicate that May 1 would work for Rhino as the next bargaining date (Jt. Exh. 48). Friedland responded that same day (March 30) via email, asking Garnett if Rhino had any other dates available, as the Union would like to "get several on the calendar." Garnett did not respond to this request¹⁴ On April 24, Friedland emailed Garnett to confirm the May 1 bargaining session, and again asked "Any additional dates?" (Jt. Exh. 55).
15 On the same day, Garnett responded to Friedland, confirming that Rhino would be present on May 1, at 11 a.m. Garnett did not respond to Friedland's question regarding additional dates (Jt. Exh. 56).¹⁵

20 The parties met again for bargaining on May 1, but instead of starting at 11 a.m., as had been agreed to, the session started at 11:55 a.m., because Rhino's representatives were having breakfast.¹⁶ Initially, Garnett came into the meeting room at 11:05 a.m., and stated that Rhino's team was having breakfast and would return shortly. He also stated that Rhino wanted to discuss the confidentiality agreement (proffered in the last meeting) first, the Union informed him that they had a counter proposal on that and handed him a hardcopy, followed by an electronic copy
25 via email at 11:21 a.m. (Jt. Exh. 57).¹⁷ Garnett returned with the rest of Rhino's team at 11:55 a.m., and for the next couple of hours the discussion centered on the confidentiality agreement

¹⁴ Garnett's March 30 email (Jt. Exh. 48) did not state why other dates, among the multiple ones suggested by the Union, would not be available. In this regard, it should be noted that Respondent prepared a calendar, admitted as Respondent's exhibit 2(b) (R. Exh. 2(b)), that showed which bargaining dates had been proposed by the Union (UP Date), as well as those proposed by Rhino (CP Date) during the period from December 2017 through February 2019. The calendar also indicates why Rhino's various bargaining representatives were not available on different dates. I note that there is no indication that Rhino's representatives were unavailable on May 2, for example, the day following the May 1 date Rhino accepted. During Garnett's testimony, I specifically asked him why Rhino had not also accepted May 2 that had also been proposed by the Union but he had no explanation (Tr. 731).

¹⁵ Between March 29 and the next bargaining session on May 1, the parties also exchanged several emails regarding both the Union's and Rhino's request for information from each other. I do not see these exchanges as material to the issues herein and therefore will not discuss these in detail, as there are no allegations in the complaint regarding Respondent's failure to provide, or delay in providing, information requested by the Union. While the parties arguably spent a significant amount of time during the bargaining sessions discussing the information requests, there is likewise no allegation that this conduct was unlawful, since both parties voluntarily did so.

¹⁶ The Union acquiesced to the 11 a.m. starting time, as in earlier meetings, in order to accommodate Rhino's team traveling schedule, because some of them were apparently flying into Seattle that same morning (Tr. 104). Present for the Union at this session were Bateman, Friedland, Daley, Venetucci, Dawson, Yimm, Wright, and Iglitzin. Present for Rhino were Garnett, Giek, Smith and Medley.

¹⁷ The email admitted as Jt. Exh. 57 has a time stamp of 1:21 p.m., but that is actually Central Time, where Garnett's server resides. The time of delivery in Seattle was 11:21 a.m. Garnett responded a few minutes later, indicating that Rhino would work on a counter offer (Jt. Exh. 58).

and Rhino’s request for information from the Union.¹⁸ During this period, the parties broke to caucus twice, the first one from 12:03 to 12:17 p.m. to discuss the confidentiality agreement, and a longer caucus from 12:27 p.m. until 2:28 p.m. to prepare counter-proposals. At 1:58 p.m., while still caucusing, Rhino emailed the Union a counter-proposal to the Union’s March 29 contractual proposal.¹⁹ After the approximately 2-hour caucus, the parties resume face-to-face negotiations at 2:28 p.m., and discussed Rhino’s contractual counter-proposal, with Rhino explaining the changes it was proposing in the various articles, which numerically tracked the articles in the Union’s initial proposal. Another caucus was taken at 2:46 p.m., and at 3:16 p.m., Smith advised the Union that Rhino’s representatives needed to leave for the airport by 3:30 p.m., so the parties re-convened at the table. Another brief discussion ensued regarding the contractual proposals, with Garnett stating they were not agreeable to some of the other proposals and that Rhino would get back to the Union regarding others yet to be discussed.

As noted earlier, although the above-described events are not truly in dispute, what occurred next, before the bargaining session ended, is disputed. According to the testimony of Friedland, the discussion then turned to future bargaining dates. Friedland testified, and her bargaining notes confirm, that Rhino’s CEO, Giek, then stated that he was available to meet on June 28 and 29, as well as July 2, 5, 6, 12 and 13. Garnett said that he was “iffy” about June 28, less iffy on (or about) June 29. Smith said she was “out” (unavailable) July 5 and 6. The Union then stated that it would check its calendars and get back to Rhino about this. Garnett, on the other hand, testified that Giek never offered (future) bargaining dates at the May 1 session, explaining that he “would never allow that,” implying that he was the chief spokesperson for Rhino (and that he had presumably advised his client to let him speak for Rhino).²⁰ I note, however, that Friedland’s bargaining notes support her version, and that neither Giek nor Smith, who testified about what transpired during bargaining, addressed this issue in their testimony, and thus did not corroborate Garnett.²¹ Finally, I note that in a follow-up email sent to Garnett that same evening, Friedland stated: “In connection with the dates you gave us for subsequently (sic) bargaining sessions, we are available on the following...,” and lists June 28, and July 2 and 12 (Jt. Exh. 64). Garnett never sent a reply correcting Friedland’s version of events. Accordingly, I credit Friedland and find that Giek offered the dates described above. The May 1

¹⁸ During this time period, the Union proffered another counter-proposal to the confidentiality agreement (Jt. Exh. 62), as well as a comprehensive written response to Rhino’s request for information (Jt. Exh. 61).

¹⁹ During the trial, as well as in its brief, the General Counsel insinuates that Garnett was improperly using caucusing time to draft proposals, and that Rhino’s contractual counter-proposal in this instance was drafted during this period—an example supporting the complaint’s allegation that Respondent had “failed and refused to come to bargaining sessions with prepared proposals” (see Complaint, Par. 8(a)(iv)). Garnett testified that he had drafted this counter-proposal prior to the May 1 session and proffered a computer time-stamp showing that the document was indeed created prior to May 1 (R. Exh. 6). Garnett further testified that while he had intended to proffer the counter-proposal earlier in the session, but the parties got side-tracked discussing the ground rules and confidentiality agreement. I credit Garnett’s testimony, which was supported by the computer time-stamp and the circumstances. As will be discussed more thoroughly below, however, it is ultimately irrelevant if Garnett had indeed drafted the counter-proposal during caucus time, or had not drafted it at all, because this allegation is simply inconsistent with Board law regarding the requirements of good faith bargaining and lacks merit.

²⁰ I do not find this argument very convincing, as clients who have a mind of their own and do not always follow counsels’ advice are legend and the bane of attorneys’ existence.

²¹ Garnett’s May 1 bargaining notes (R. Exh. 5) reflect that the parties discussed June 28 and 29, as well as July 2, 12 and 13 as future bargaining dates, but do not reflect who suggested those dates to begin with.

bargaining session then ended at 3:24 p.m., when Rhino’s representatives departed for the airport.²²

As briefly noted above, on the evening of May 1 Friedland emailed Garnett indicating that among the future bargaining dates that had been proposed by Rhino (specifically, by Giek), the Union was available on June 28, as well as July 2 and 12 (Jt. Exh. 64). Garnett responded that same evening via email, choosing July 12 for the next bargaining session (Jt. Exh. 65). Friedland responded to Garnett within the hour, stating as follows: “We were actually hoping for all three dates. If you are saying you can’t meet until July 12, we would appreciate your letting us know about additional dates your team is available” (Jt. Exh. 66). On May 7, Garnett responded to Friedland’s request for additional bargaining dates as follows: “As I mentioned at the table, June 28th is not good for me, I’m in New Orleans. July 2nd is also the Monday of the July 4th holiday. If you want to have discussions by phone on the 2nd, we can arrange for that. Let me know.” According to Friedland, Garnett never responded to her request that his team suggest or provide additional dates if they were unavailable for the dates discussed at the May 1 session and the email correspondence that followed, and there is no record that he did. On May 17 Friedland emailed Garnett, declining his offer to meet via telephone on July 2, indicating that the Union believed face to face negotiations would be more fruitful. Friedland confirmed the Union’s agreement to meet on July 12 at the offices of Garnett’s law firm in downtown Seattle, as Garnett had requested. Friedland concluded her email with the following message: “Again, we would like to set multiple dates rather than do so after each session. So if your team can review their calendars and let us know what other dates work, we will respond promptly as we did following our last session” (Jt. Exh. 72). Garnett replied on the same date, stating that while he agreed that face to face negotiations have been fruitful, some issues could be discussed via telephone or using on-line conferring services like “WebEx” (Jt. Exh. 73). Garnett never addressed Friedland’s repeated request that Rhino’s team provide additional “multiple” dates for future bargaining. Friedland responded the following day, May 18, with the following message: “11a-4P? Other dates?” (Jt. Exh. 74). Garnett responded that same afternoon, confirming that they would start the July 12 bargaining session at 11 am, as in the past, but might need to end the session at 3 or 3:30 pm, depending on Rhino’s team flight schedules. He repeated his offer to meet via conference call prior to the July 12 session, in order to discuss “discreet” issues such as

²² Friedland testified, and calculations that appear on her bargaining notes reflect, that the parties sent 3 hours and 35 minutes caucusing during the May 1 bargaining session, while spending only a total of 44 minutes engaged in face-to-face discussions at the table. Friedland admitted, however, that she wasn’t sure which side requested to caucus on any given occasion (Tr. 124–125), and it isn’t clear from her notes. Friedland also testified that it was during the May 1 session that the Union first learned for the first time (from one of the attending bargaining committee members, Lisa Yimm) that Rhino had unilaterally implemented a new policy regarding the wearing of safety boots by riggers. This will be discussed below, in a separate section regarding that allegation.

safety boots (Jt. Exh. 75). Again, he did not specifically respond to Friedland’s request for additional “multiple” bargaining dates for future sessions.²³

The parties had their next bargaining session on July 12, in Seattle.²⁴ According to the testimony of both Friedland and Garnett, and their respective bargaining notes (Jt. Exhs. 10; 15; R. Exh. 7), shortly after the session began the discussion turned to two issues: (1) the information request by the Union, and whether Rhino had complied with such request(s); and (2) the issue of the policy regarding safety boots that Rhino had implemented in January, and recently rescinded, as discussed below. The discussion of these two topics, which the bargaining notes reflect turned contentious and argumentative at times, consumed the better part of the session, from about 11:20 am to about 3:19 pm, excluding time taken out for caucusing.²⁵ It is undisputed that the parties did not exchange “substantive” (or contractual) proposals until 3:19 pm, when the Union sent Garnett a proposal regarding article 10 via email (Jt. Exh. 96). About an hour later, Garnett forwarded Rhino’s comprehensive contractual counter-proposal to the Union (Jt. Exh. 97). The Union asked for hard copies of Rhino’s proposal, which were provided shortly afterwards. Unlike prior bargaining sessions, which had ended in mid-afternoon to accommodate Rhino’s travel needs, the July 12 session went to 5 pm, when the Union departed. Before the session ended, the Union (by Bateman) emailed Garnett, proposing August 15th, 20th, 27th, 29th, and 31st as possible dates for the following bargaining session (Jt. Exh. 101).

²³ Between May 1 and July 13, in addition to the emails between Friedland and Garnett discussed above, the Union and Rhino had numerous additional communications via emails and letters attached thereto, primarily between Garnett (and/or associates) and the Union’s counsel, Dmitri Iglitzin (and/or associates). These communications dealt primarily with the requests for information made by the Union or by Rhino, including a tentative confidentiality agreement reached between the parties to resolve one of the outstanding information items requested by the Union—and whether such agreement might result in the withdrawal of charges filed with the Board by the Union regarding its information requests. In that regard, I take judicial notice that on April 27, 2018, the Regional Director had issued a complaint in Case 19–CA–213768, alleging that Rhino had failed and refused to provide information requested by the Union, and a hearing was scheduled to commence on July 17. On July 16 Rhino entered into a settlement agreement with the Region in that case, and the hearing was postponed and eventually cancelled. These communications between the parties also addressed the issue of the policy that Rhino had implemented regarding work safety boots, as discussed below (see, Jt. Exhs. 67; 69; 70; 71; 76; 77; 78; 79; 80; 81; 82; 83; 84; 85; 86; 87; 88; 89; 90; 91; 92; 93; 94; 95; 99; 100; 107; 108; 109; and 110). While some of these communications may shed some light or provide background or context regarding the issues covered by the instant complaint, I do not find it necessary to discuss them in detail, as they will ultimately be of little, if any, value in determining the merit of the allegations before me.

²⁴ Present for the Union were Bateman, Friedland, Daley, West, Venetucci, Dawson, Wright and Iglitzin. Present for Rhino were Garnett, Giek, Smith, and Medley.

²⁵ Friedland’s bargaining notes indicate that Garnett initially brought up these two subjects, stating that Rhino wanted to discuss these two issues. The notes also reflect, however, that the Union acquiesced in these discussions, which it could have stopped by assertively insisting that these topics were not mandatory subjects of bargaining.

On July 18, Garnett responded, choosing August 31st as the sole date for the next bargaining session (Jt. Exh. 112).²⁶

5 The parties met again in Seattle to bargain on August 31, as agreed to.²⁷ Friedland did not testify about the events of these meeting, and Garnett did so only in very brief fashion, so the summary that follows is solely based on Friedland’s and Garnett’s bargaining notes (GC Exh. 6; R. Exh. 10).²⁸ The meeting started shortly after 9 a.m. and ended around 4 pm, when the Rhino team left. During the session, the parties primarily discussed article 1 (Recognition) and its various subdivisions, as well as article 3 (Hiring and Staffing of Riggers). Much discussion and spirited debate was had particularly with regard the Union’s proposed security clause (article 1.2, which Rhino vigorously opposed), as well as the various parts of article 3. By the end of the session, the parties had tentatively agreed to parts of article 1.1 (the preamble or introduction about Employees Included), parts of article 1.2 (Union and Company rights), Article 1.4 (Non-Discrimination clause), and parts of article 3.1 (Staffing and Hiring of Riggers). During the meeting, Rhino also proposed modifying the agreed-upon “ground rules,” proposing that the parties meet once per month in person and once per month via WebEx (electronic teleconference). The Union re-iterated its position that wanted to bargain face to face. Before the meeting ended, the Union proposed to meet again on September 28th, October 15th and/or 16th. Rhino rejected September 28th because it was Smith’s wedding anniversary, and turned down October 15 and 16 because of Giek’s scheduled surgery, which would make him unable to travel for 6 to 7 weeks, pursuant to medical advice. The Union stated that it would look at other possible dates, and the meeting ended shortly thereafter. A few minutes later, Friedland emailed Garnett, proposing September 15th (a Saturday), September 27th, September 29th and 30th

²⁶ On July 12 and the days that followed, Bateman and Garnett exchanged emails regarding the changes that Rhino had made in its July 12 contractual counter-proposals, with Bateman essentially claiming that they were confusing and difficult to follow, and Garnett disagreeing and explaining the proposals—and offering to further discuss these on the August 31 meeting (Jt. Exhs. 105; 106). The record also shows that Bateman on July 25 sent Garnett an email accusing Rhino of dilatory tactics during the July 12 bargaining session, and Garnett denying such assertion in his response dated August 15 (Jt. Exh. 113). It is notable that in her brief, the General Counsel quotes at length from Bateman’s email to Garnett, as if the events he described therein were established facts. They are not; indeed, Bateman’s rendition of events in his email is classic hearsay. Bateman did not testify, and thus did not subject himself to cross-examination, which is precisely what the rule against hearsay is meant to prevent. Quite simply, if the General Counsel felt Bateman’s rendition of what occurred on July 12 was important, he should have been called to the stand. Accordingly, I consider these emails of scant probative value, representing little more than the parties’ opinions. I note that Friedland’s testimony regarding the July 12 bargaining session was also very limited, so I must rely primarily on Friedland’s and Garnett’s bargaining notes to determine what occurred at that session.

²⁷ As noted earlier, in the complaint, the General Counsel had initially alleged that Respondent’s unlawful conduct took place through the first 4 bargaining sessions, concluding on July 12. At the hearing, the General Counsel amended the complaint to include Respondent’s bargaining conduct through the date of the hearing in December. As discussed below, the parties held only two more bargaining sessions during this period, on August 31 and October 11. Present for the Union for the August 31 session were: Bateman, Friedland, Daley, Maynard Smith, Venetucci, Wright, and Iglitzin. Present for Rhino were: Garnett, Giek and Smith.

²⁸ Thus, Garnett’s testimony about the October 11 session was limited to his stating that the parties exchanged proposals, had “spirited” discussions about them, and reached tentative agreements on some.

(Saturday/Sunday), and October 11th as additional bargaining dates. Later that evening, Garnett responded, choosing October 11th as the only day among the ones proposed (Jt. Exh. 120).²⁹ On September 5, Garnett emailed Friedland to confirm that space was available at his firm's Seattle office on October 11, from 7 am to 3pm (Jt. Exh. 122). On September 26, Friedland
 5 responded that the Union would be available starting at 9 am, but was willing to go until 5 pm rather than 3 pm. On the same day, Garnett responded that 9 am was acceptable as the starting time, but that the session would have to end at 3 pm because of Rhino's team flight schedules (Jt. Exh. 123).

10 The parties met again in Seattle on October 11, starting shortly after 9 am, as agreed to. As with the August 31 bargaining session, there is little testimony as to what occurred during this session, with no testimony from Friedland (or anyone else on the Union's side), and only brief testimony from Garnett about it. Thus, my summary is based primarily on Friedland's and
 15 Garnett's bargaining notes.³⁰ The parties initially had discussions about the formatting of the counter-proposals submitted by Rhino, which apparently did not follow the formatting of the original proposals by the Union, and had consequently resulted in some confusion or uncertainty on the Union's part as to exactly what had been tentatively agreed to in the prior session. As the result of these discussions, Garnett re-formatted some of the previously submitted proposals, and the Union thereafter proffered additional proposals regarding article 1.2, parts of which had been
 20 previously agreed upon, as well as article 1.3. Rhino rejected the Union's article 1.3 proposal, and after a caucus submitted a counter-proposal on that article. Eventually, the parties tentatively agreed to language in that article, after further discussions. The Union also made a proposal regarding article 3.1 (Staffing of calls), which engendered much discussion, and the parties then broke to caucus again.³¹ After the caucus, Rhino made a counter proposal regarding
 25 article 3.1, but no agreement was reached on this article. By the end of the session, the parties had tentative agreements on article 1.1 (Employees Included), article 1.4 (Non-Discrimination), and article 1.3 (Calls and Work not Covered), although some of these agreements appears to have been clarification of the exact language previously agreed to. Prior to the end of the session, the Union proposed December 17, 18, 20 and 21, and January 3, 4 and 8, 2019, for
 30 future bargaining dates.³² Garnett stated he would forward the dates to Smith and Giek, who had departed a few minutes earlier for the airport. He again proposed that the parties could bargain via WebEx video conference, an offer that the Union rejected. The session ended at 3:30 pm.

²⁹ In his response, as in previous occasions, Garnett did not offer any explanations as to why no other dates were not acceptable to Rhino. Garnett testified, however, that he could not negotiate on weekends because it would interfere with a second job as a cycling instructor (at his home in St. Louis), and because Giek and Smith wanted to spend time with their families on weekends (Tr. 603–604; 665–666; 742–743; 760).

³⁰ Friedland's handwritten bargaining notes are contained in Joint Exhibit 12 (Jt. Exh. 12), with the typewritten version in evidence as General Counsel's Exhibit 7 (GC Exh. 7). I rely primarily on the typewritten version, since the handwritten version is difficult to decipher at times. Garnett's handwritten bargaining notes, somewhat more readable but less detailed and copious than Friedland's, appear as Respondent's Exhibit 10 (R. Exh. 10).

³¹ In her post-hearing brief, the General Counsel repeatedly implies that in all the bargaining sessions Rhino was abusing the caucus process by taking—or wasting—too much time to discuss and prepare counter proposals it should have already discussed and prepared. In addition to the legal reasons why this argument lacks merit, as will be discussed below, the simple fact is that in most instances the record is not clear as to which side requested the caucus, and it also fails to show that the Union objected to the amount of time Rhino was using in its caucuses—at least at the time.

³² As discussed above, Rhino had advised that Giek would be unavailable for 6–7 weeks starting in mid-October due to his surgery.

Later the same evening, Garnett emailed Union Counsel Iglitzin, proposing December 11 as the date for the next bargaining session. Iglitzin was uncertain about December 11, since it was the day after the hearing in the instant case was scheduled to begin, and no one at the time was certain how long the hearing would last. Eventually, as the date grew closer and the parties realized the hearing might last all week, the parties decided to choose a later date.

C. Rhino’s Implementation of a New Work Boots Policy

It is undisputed that prior to January 1, 2018, Rhino had a policy, as contained in its Handbook, which stated “[b]lack (or dark near black in color) steel toe boots (preferred) or sturdy work boots that protect the feet and toes are required on all calls,” which applied to all employees, including bargaining unit employees (Jt. Exh. 139). While this policy, according to Giek’s testimony, required the wearing of boots, steel-toed or otherwise (Tr. 767), in practice riggers were often allowed to wear other shoes that would permit them to comfortably work up high. Thus, Lisa Yimm testified that “up-riggers” (riggers that work in elevated settings) often wore tennis shoes or similar footwear, which had better grip and was less cumbersome than boots (Tr. 472–473; 510–511).³³ It is also undisputed that on December 7, 2017, Rhino sent an email to its employees which, in relevant part, stated: “Beginning January 1, 2018, Rhino will **REQUIRE** all employees to wear **steel-composite toe over-the-ankle works boots** to every job (unless otherwise instructed). Employees who show up to work without proper footwear **will be sent home**” (emphasis in original) (Jt. Exh. 137).³⁴

Respondent did not notify or bargain with the Union about this change in the safety boot policy, which was implemented on January 1, 2018. Indeed, Giek admitted that the Union was not notified because he did not believe this change was a “big deal” (Tr. 769). The Union did not find out about this change of policy until one of the riggers in the bargaining unit, Yimm, notified it during the May 1 bargaining session.³⁵ Finally, it is undisputed that Rhino rescinded this policy, as it pertained to bargaining unit employees, on July 5, 2018 (Jt. Exh. 138).

IV. ANALYSIS

As briefly discussed above, the complaint alleges two distinct categories of violations regarding Respondent’s duty, under Section 8(a)(5) of the Act, to bargain in good faith with the Union. The first category involves Respondent’s alleged conduct during collective-bargaining negotiations and the scheduling of such negotiations, and five distinct types of conduct are alleged under this category. The second category of conduct alleged to violate Section 8(a)(5) is Respondent’s unilateral implementation of the (work) boots policy on or about January 1, 2018,

³³ I credit Yimm’s testimony, which was not contradicted and was based on her own observations. In that regard, this formerly allowed practice may explain why the new policy announced on December 2017, as described immediately below, may have specifically mandated “over-the-ankle” boots, a term or definition that the prior policy did not contain.

³⁴ The email informing of the new requirement contained a list of links directing individuals to “acceptable work boots” that could be purchased to comply with the new requirement. According to the testimony of Giek, the cost of these boots would be anywhere from \$35 to \$100 or more, depending on the brand and style (Tr. 777).

³⁵ As discussed above, this became a “hot topic” during the May 1 and particularly the July 12 bargaining sessions, and resulted in the Union filing a charge with the Board in one of the above-captioned cases.

which was later rescinded in July of that year. I will first discuss the allegations involving Respondent’s conduct during bargaining.

A. Respondent’s Conduct During Bargaining or the Scheduling of Such Bargaining

Paragraph 8(a) subsections (i) through (v) of the complaint alleges that Respondent engaged in bad faith bargaining in violation of Section 8(a) (5) of the Act when it:

1. Failed and refused to meet with the Union to bargain on a regular basis;
2. Failed and refused to meet with the Union for an appropriate amount of time to bargain;
3. Failed and refused to engage in meaningful bargaining during negotiations;
4. Failed and refused to come to bargaining sessions with prepared proposals; and
5. Insisted on claiming the Union is a competitor of Respondent despite Board decisions finding it to be a labor organization.

I will discuss these allegations in the order they appear above.

1. The allegation that Respondent failed and refused to meet with the Union to bargain on a regular basis.

The General Counsel alleges that Respondent, during the course of negotiations during calendar year 2018, met with the Union only six (6) times, with the first negotiation occurring on February 9 and the last one on October 11.³⁶ The General Counsel argues that this meager number of bargaining sessions was the result of Respondent’s dilatory tactics, such as not responding the Union’s multiple requests to schedule more than one bargaining session at a time, or for multiple (or consecutive) days of bargaining, and then only bargaining for about half a day each time because Respondent’s representatives had to both fly in and flight out on the day it chose for bargaining. The General Counsel further argues that by strictly limiting the number of times it agreed to meet, in addition to its other conduct, Respondent displayed bad faith. Respondent, on the other hand, argues that in addition to agreeing to meet with the Union in person on six occasions during 2018, it repeatedly offered to supplement the in-person meetings by bargaining via “WebEx,” a video tele-conference system, an offer that the Union rejected, because it preferred to meet in person. It further argues that using the totality-of-the-circumstances test under Board precedent, it did not engage in bad faith dilatory tactics.³⁷ Finally, Respondent argues that the Union never insisted or pressed Respondent for more bargaining dates and acquiesced to the schedule set. For the reasons set forth below, I have concluded that the General Counsel has the better argument and that this allegation has merit.

³⁶ As discussed in the facts section, the parties met on February 9, March 29, May 1, July 12, August 31, and October 11, or on average about once every 6–7 weeks.

³⁷ Although it did not specifically mention it as a defense, throughout the record Respondent introduced evidence, either through the testimony of its witnesses or through exhibits such as the calendar admitted as Respondent’s Exhibit 1, that clearly suggested that its bargaining representatives’ busy schedules and the geographic location of their residences made it extremely difficult and inconvenient to schedule more frequent or lengthier bargaining sessions (See, e.g. Respondent’s posttrial brief, p. 33–34). Thus, testimony was proffered that Garnett, Respondent’s counsel and lead negotiator, had to travel from his residence in St. Louis to Seattle (and back); Giek, had to travel from San Diego; Smith had to travel from Las Vegas; and Acuna had to travel from Denver.

Section 8(d) of the Act mandates that parties meet at “reasonable times,” a term which although not defined in the Act, has been repeatedly interpreted by the Board and the courts to mean that parties are required to meet for bargaining at reasonable intervals, and without unreasonable delays. *Richard Mellow Elec. Contractors Corp.*, 327 NLRB 1112 (1018 (1999)); *Fern Terrace Lodge of Bowling Green*, 297 NLRB 8 (1989); *Teamsters Local 122 (Busch & Co.)*, 334 NLRB 1190 (2001); *Sparks Nugget, Inc. d/b/a John Acuaga’s Nugget v. NLRB*, 968 F.2d 991, 995 (9th Cir. 1992). There are no rigid or precise rules setting forth the number, frequency or duration of bargaining meetings necessary to satisfy the parties’ obligations under Section 8(d), but parameters exist by which to judge the parties’ good faith in these endeavors. The Board thus looks at a number of factors, such as, inter alia, the number of meetings, whether the employer engaged in dilatory tactics, whether the union requested more frequent meetings, and whether the parties placed other limits in the times they could bargain. *Calex Corp.*, 322 NLRB 977, 978 (1997), *enfd.* 144 F.3d 904 (6th Cir. 1998); *Barclay Caterers, Inc.*, 308 NLRB 1025 (1992); *People Care, Inc.*, 327 NLRB 814 (1999).

As briefly mentioned above, the parties met only six times for negotiations during the course of 2018, but this meager number of meetings did not result from the Union’s lack of efforts to meet much more often. Indeed, the record shows that the Union consistently and repeatedly requested additional bargaining sessions from Respondent, requests which fell on deaf ears and were simply ignored. When Respondent finally responded to *some* of these requests, usually 6 to 8 weeks later, its representatives’ calendars—surprise—were already full. Thus, on January 9, after the parties agreed to have their first session on February 9, the Union requested that “everyone” bring their calendars to the February 9 meeting, so that additional “multiple bargaining dates” (emphasis supplied) could be scheduled at that meeting. At the February 9 meeting, the Union proposed additional meetings during the *weeks* of February 26, March 5, March 19, and March 26 (emphasis supplied). Out of the approximately 20 possible bargaining dates that the Union proposed, Respondent chose only 1 day, March 29, one of the last days of those suggested. As discussed below, this soon became a pattern, with the Union proposing multiple future bargaining dates, and Respondent choosing only one date among the many offered—and (with one notable exception) never proffering any dates of its own. Five days later, on February 14, the Union emailed Respondent (Garnett) that it was available on additional earlier dates. There was no response. Two weeks later, on February 28, the Union emailed again, indicating that it received no response, and again requesting “multiple bargaining dates,” and further proposing the weeks of April 2 and 9 for bargaining—with some dates on those weeks excepted. There was no response. On March 20, the Union emailed again, noting that Respondent had not responded to its earlier emails, and requested that it provide additional bargaining dates during the weeks of April 2 and 9. Later that day, Garnett responded that he would “check with his client” when he returned to St. Louis (his office) regarding additional bargaining dates.³⁸ Eight days later, on March 28, the day before the scheduled March 29 bargaining meeting, Garnett emailed the Union, suggesting that future bargaining dates should be discussed the following day, at the meeting.

³⁸ Thus, Garnett was finally checking with his client about additional bargaining dates some 6 weeks after the Union initially requested additional dates in its February 14 email, which was followed by multiple similar requests, which were similarly ignored.

The next day, during the March 29 meeting, the Union brought up the subject of future bargaining dates. Garnett stated that Jeff Giek (Respondent’s CEO) was “not available” during April. The Union then proposed meeting on May 1 and 2, as well as May 6 through 13, indicating it was available to meet Saturdays and Sundays—and again proposing that the parties schedule 2–3 future bargaining dates at once. Garnett responded that Giek was not available May 9 through the 11, or May 11 either, and that he would “get back” to the Union about future dates, hopefully by the following day.³⁹ The following day, March 30, Garnett emailed the Union, indicating that Respondent was available to bargain on May 1, the only day chosen among the many proffered by the Union.⁴⁰ The Union responded on that same day, again asking if Respondent had any other dates available, because the Union wanted to get several dates booked. There was no response. On April 24, the Union emailed Respondent to confirm the May 1 bargaining date, and again asked “any additional dates?” Garnett responded later on the same day, confirming the May 1 bargaining date—and ignoring the request for additional dates.

Towards the end of the May 1 bargaining meeting, the subject turned to future bargaining dates. Unlike in past, where it had always been the Union proposing future or additional bargaining dates, Giek spoke up and stated that he would be available to meet on June 28 and 29, as well as July 2, 5, 6, 12 and 13. Other members of his bargaining team, namely Garnett and Smith, quickly intervened, however, and stated they were not available on some of those dates.⁴¹ The Union then stated that it would get back to Respondent regarding the dates mentioned. That same evening the Union emailed Garnett, indicating that the union was available on June 28, as well as July 2 and 12. Garnett responded that same evening (May 1), choosing only July 12 among the dates that the Union had suggested, based on the dates that had been initially proffered by Giek. Minutes afterwards, the Union responded, stating that they had hoped to meet on all 3 dates—and requesting that if Respondent could not meet earlier than July 12, to suggest additional dates. Garnett responded shortly afterward, explaining that he was unavailable on June 28 because he was scheduled to be in New Orleans, and rejected July 2 because it fell on the Monday prior to July 4—implying that it was too inconvenient to travel close to a holiday—and offering to bargain over the phone on July 2 instead. Notably, Garnett (and Smith) completely neutralized Giek’s unexpected offer to be available on certain dates, and Garnett once again ignored the Union’s request to provide additional dates. On May 17, the Union emailed Garnett again, declining Garnett’s offer to bargain over the phone (on July 2), indicating that face to face meetings were preferable. The Union then confirmed its availability to bargain on July 12, and again expressed its desire to set up multiple dates in advance, rather than waiting until the next bargaining session (still 2 months away) to do so. It asked that Respondent review its calendars to suggest other bargaining dates, to which the Union would promptly respond. Garnett responded later on the same date, again offering to bargain over the phone or via WebEx.

³⁹ This scenario and sequence of events strongly suggests that Garnett, contrary to his earlier suggestion, had not come to the March 29 meeting prepared to discuss future bargaining dates.

⁴⁰ According to the calendar introduced into evidence by Respondent (R. Exh. 1), Respondent had no conflicts and was available the following day, May 2, but never offered to bargain on that day. When asked why, Garnett had no explanation.

⁴¹ As noted earlier, Giek’s proposal regarding future bargaining dates apparently caught Garnett—who denied this occurred—by surprise, since he was the lead negotiator and spokesperson for Respondent. Nevertheless, this unexpected offer by Giek was quickly neutralized by Garnett and Smith. In any event, Giek’s offer was not generous in the first place, since the earliest bargaining date proffered was some 8 weeks away—despite the Union having begged for additional dates for several weeks prior.

He ignored the Union’s request to provide additional dates for face to face bargaining. The next day, May 18, the Union emailed Garnett, asking whether the July 12 meeting would be from 11 am to 4 pm, as in past bargaining sessions. It then asked again for future bargaining dates. Garnett responded on the same day, indicating that the July 12 session would have to end at 3 or 3:30 pm because of their return flight schedules. He again ignored the Union’s request for additional bargaining dates.

On July 12, the parties met again. Towards the end of the session, via email, the Union proposed August 15, 20, 27, 29 and 31 for future bargaining dates. Six days later, on July 18, Garnett responded, choosing only August 31 among the dates proposed. The parties met again on August 31. During the course of the meeting, Respondent proposed to amend the “ground rules” that the parties had agreed to in February, proposing that the parties meet to bargain once per month in person and once per month via WebEx. The Union reiterated its preference for in-person meetings, declining to bargain via WebEx. It offered to meet on September 28 and October 15 and 16. Respondent rejected September 28 because it was Smith’s wedding anniversary, as well as October 15–16 because Giek was scheduled for surgery. Shortly afterward, while the parties were still meeting, the Union, via email, proposed to meet September 15, 27, 29 and 30, as well as October 11. Some of these dates, namely September 15 and September 29–30, fell on weekends—which Garnett had indicated he was unwilling to consider, because it interfered with his cycling lessons or other personal matters. Later the same evening, Garnett responded via email, choosing only October 11 among the dates proffered by the Union. Respondent had also notified the Union that CEO Giek would not be able to travel for about 6–7 weeks following his mid-October surgery, so the Union proposed meeting again on multiple dates in December or early January. Respondent offered December 11 for the next bargaining session, which was the day after the scheduled start of the hearing in the instant case.

Although the above-described chronicle of events may appear repetitive of the events already described in more detail in the Facts section above, such repetition is necessary to highlight and underscore Respondent’s scheduling strategy. I use the word “strategy” deliberately, because I find that Respondent’s conduct in this regard was not by fluke or accident, but rather the result of a carefully calibrated strategy of rationing bargaining sessions so as to keep them to a minimum—while maintaining the appearance of cooperation necessary to avoid clearly signaling bad faith. The Union repeatedly requested, often 6 to 8 weeks prior to the next scheduled bargaining session, that Respondent proffer additional and multiple dates for future bargaining. These multiple and repeated advance requests were simply ignored by Garnett, who then waited until the next bargaining session to discuss the topic—by which time, of course, the availability of Respondent’s bargaining representatives (including his own) was extremely limited, well into the future.⁴² In light of this, it is apparent that Respondent was deliberately controlling and slowing down the tempo of negotiations, keeping them on a short leash—a very short leash—so as to stymie the chances of success. This dilatory tactic is not only

⁴² Indeed, even by the time the next bargaining session arrived, Garnett often appeared to be unprepared to discuss the topic, and did not respond to the Union’s proffered bargaining dates until after the session. Notably, Garnett, by his own admission, is a very experienced labor attorney, having negotiated numerous collective-bargaining agreements in his approximately 40 years of practice. He conceded that initial collective-bargaining agreements typically take much longer to negotiate, because, as he put it, “every word of every sentence of every paragraph has to be negotiated” (Tr. 726).

apparent by Respondent’s refusal to respond to the Union’s multiple requests for additional bargaining dates, but also by its strategy of never counter-offering dates of its own to signal when it was available—despite the Union’s multiple requests that it do so. Thus, Respondent’s strategy was to simply say yes or no (mostly no’s) to the dates proffered by the Union, and then waiting for the Union to proffer more dates—which it would then also reject, without proffering alternatives. I conclude this strategy evidences bad faith. *Storer Communications*, 294 NLRB 1056, 1095 (1989); *Barclay Caterers*, supra; *People Care*, supra.

In its post-hearing brief, Respondent argues that the Union never “insisted” on additional bargaining dates, and that therefore it acquiesced to the bargaining tempo Respondent set. I disagree. The Union practically begged for additional multiple bargaining dates, often 8 weeks or more prior to the next scheduled bargaining session. Short of making threats, whether of strikes or the filing of additional Board charges, I cannot envision what else the Union could have done to prompt Respondent to agree to additional bargaining sessions. I do not believe that making threats should be the threshold necessary for the Union to vindicate its statutory rights, nor wise public policy to so require. Respondent also argues that its offer to bargain by telephone or via electronic tele-conference such as WebEx evidences its good faith and desire to keep the negotiations flowing. I disagree. Although the Board has yet to rule whether an offer to bargain via videoconference, absent mutual agreement, satisfies a party’s obligation to meet at “reasonable times,” it has ruled that an employer cannot insist on telephone bargaining. See *Alle Arecibo Corp.*, 264 NLRB 1267 (1982); *Success Village Apartments*, 347 NLRB 1065, 1080 (2006). In this case, the Union informed Respondent at a very early stage of its strong preference for in-person bargaining and its opposition to telephone or video conference bargaining. In light of the circumstances described above, Respondent’s belated offers to bargain via WebEx can reasonably be seen as an empty gesture that should not provide Respondent absolution or cover for its otherwise dilatory tactics.

It is worth noting that despite Respondent’s assertion, in its post-hearing brief, that it is not invoking the “busy lawyer (or representative)” defense to justify the meager number of bargaining sessions during 2018, a careful examination of the record shows that in fact raising this defense is precisely what it did—call it the “busy bargaining committee” defense. For example, Garnett testified that Respondent’s team members had “geographic challenges” going to Seattle for negotiations, and had “very busy schedules” which conflicted with the bargaining dates proposed by the Union, adding that the April to October period was particularly busy for Rhino (Tr. 714–716).⁴³ Indeed, the calendar introduced by Respondent into the record (R. Exh. 1), which shows the various commitments and conflicts its team members had with the bargaining dates proposed by the Union, has little or no relevance except to show that the various members of Respondent’s bargaining team were indeed very busy. There are two principal reasons why this defense is spurious. First, the Board (and the courts) have long rejected the

⁴³ Garnett was flying into Seattle from St. Louis, about a 3.5-hour flight; Giek was flying in from San Diego, about a 3-hour flight; Smith was flying from Las Vegas, about a 2.5-hour flight; and Acuna was flying in from Denver, about a 2.5-hour flight. As discussed below, Respondent’s representatives insisted on flying into and out of Seattle on the same day, which meant that the bargaining sessions had to start around 11 am and end by 3:30 or so, in order to catch the flights back home on the same day. This limited the bargaining sessions to about 4 hours, which means that Respondent’s representatives were spending far more time traveling than actually bargaining. To describe these arrangements as grossly inefficient would be an understatement, if efficiency is defined as the potential to accomplish much.

“busy lawyer” or “busy schedule” defense. See, e.g., *Barclay Caterers*, supra., and cases cited therein; *People Care*, supra.; *Calex Corp.*, supra.; *NLRB v. Exchange Parts Co.*, 339 F.2d 829, 832 (5th Cir. 1965). As the Board stated in *Caribe Staple Co.*, 313 NLRB 877, at 893 (1994):

“Considerations of personal convenience, including geographic or personal conflicts, do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity. An employer acts at its peril when it selects an agent incapacitated by these or any other conflicts.” Simply put, Respondent was not privileged to subordinate to all other business or personal considerations its statutory obligation to meet and bargain with the Union at reasonable times. Second, as discussed above, had Respondent not ignored the Union’s pleas for additional bargaining dates, often submitted as much as 6–8 weeks in advance, until the last minute, its agents may not have had these conflicts in the first place. By refusing to address these requests for additional bargaining dates until it was too late, Respondent intentionally sabotaged any chances of having a conflict-free date available in the near future.

Accordingly, I conclude that Respondent’s conduct with regard to the scheduling of bargaining sessions reflected bad faith. In reaching this conclusion, I do not view this conduct in complete isolation, even though the dilatory tactics described above are sufficient, by themselves, to signal bad faith. Other conduct by Respondent points to, or at least hints at, a frame of mind indicative of bad faith. For example, in 2015, prior to the election that resulted in the Union ultimately being certified as the collective-bargaining representative of the unit employees, Giek gave a captive audience speech to Rhino’s employees. In the speech, Giek stated, inter alia, that “the first contract after an election takes a long time to negotiate,” and also that he was aware that “some negotiations in our industry taking years to negotiate.” (GC Exh. 4). Although there is nothing unlawful in this statement, which is typical of many such pre-election statements by employers, it provides a context by which to view Respondent’s frame of mind during the 2018 negotiations. Thus, in the context of its approach to scheduling bargaining sessions in 2018, such statement can now be viewed not as a discussion of how negotiations *might* turn out, but rather as a prophesy of the approach Respondent would take. Given Respondent’s dilatory conduct in scheduling bargaining sessions in 2018, it would appear that these negotiations would indeed take years, as prophesized in 2015. Likewise, Respondent’s consistent practice of choosing 1 day—and only 1 day—for negotiations among the many offered, in combination with its practice of flying into and out of Seattle on that same day, guaranteed that the negotiation sessions would be kept very short—and predictably unfruitful.⁴⁴ As described earlier, Garnett, Respondent’s spokesperson and principal negotiator, is a very experienced labor lawyer, with many collective-bargaining agreements under his belt. In light of his admission that initial contracts take much longer to negotiate, because as he put it, “every word of every sentence of every paragraph has to be negotiated,” it is reasonable to infer that he knew the pace Respondent had set would result in protracted negotiations, perhaps for years, absent a complete capitulation by the Union. Finally, I note the record contains numerous emails and communications that indicate that Respondent resisted and delayed providing the Union with information it was entitled to as the representative of the bargaining unit employees, and which

⁴⁴ It is true that the Union acquiesced to the “half day” schedule of bargaining that started around 11 am and ended around 3:30 pm, which Respondent insisted on in order to permit its representatives to arrive and depart out of Seattle on the same day. For this reason, as discussed below, I do not find this practice to independently represent bad faith bargaining, as alleged in the complaint. Nonetheless, I believe this practice sheds light on Respondent’s frame of mind and its intent with regard to the scheduling of bargaining sessions.

the Union needed in order to properly bargain for a collective-bargaining agreement. The instant complaint does not allege a separate violation for such conduct, and I therefore make no findings in that regard. I can, however, take judicial notice of the settlement agreement that Respondent entered into on July 16, 2018 in Case 19–CA–213768, in which the complaint alleged that Respondent had violated Section 8(a)(1)(5) of the Act by refusing and failing to provide the Union with information it had requested. *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 fn. 14, enfd. per curiam __ Fed. Appx __, 2019 WL 3229142 (D.C. Cir. July 12, 2019) (2018); *Metro Demolition Co.*, 348 NLRB 272 fn. 3 (2006). This settlement agreement does not contain a non-admissions clause, and by its terms Respondent agrees to a default judgment in case on non-compliance with the remedial provisions of the agreement.⁴⁵ Accordingly, I have considered Respondent’s conduct in that regard in determining whether it displayed bad faith. Altogether, these additional factors reinforce my finding that Respondent’s conduct did not reflect good faith.

For the reasons discussed above, I conclude that as alleged in paragraph(s) 8(a)(i) and 9 of the complaint, Respondent violated Section 8(a)(1)(5) of the Act by failing and refusing to meet with the Union at reasonable intervals and without unreasonable delays.

2. The allegation that Respondent failed and refused to meet with the Union for an appropriate amount of time to bargain.

In support of this allegation, contained in paragraph 8(a)(ii) of the complaint, the General Counsel argues that Respondent’s practice and insistence of traveling to and from the negotiations in Seattle on the same day scheduled for bargaining, limited the bargaining to only half a day, reflected bad faith. As described briefly above, starting with the first bargaining meeting on February 9, Respondent requested that the meeting start at 11 a.m. and end in mid-afternoon, around 3:30 p.m., in order to accommodate the travel plans of its representatives. As noted earlier, Respondent’s representatives were flying into Seattle from St. Louis, San Diego, Las Vegas and Denver, and desired to arrive and depart on the same day scheduled for bargaining—in order to minimize the interruption of their business and personal affairs. The end result of this practice was to limit bargaining sessions to only half a day, from late morning to mid-afternoon, as noted.

Such practice, particularly in combination with the dilatory tactics employed by Respondent in its scheduling of bargaining dates, as described above, would normally reflect bad faith. As discussed above, Respondent cannot subordinate its obligation to bargain to other business and personal obligations; the “busy bargaining committee” defense is invalid. In this case, however, the Union went along and acquiesced to this practice. From the start, apparently out of courtesy, the Union agreed to the late starting time and early ending time for every meeting. Indeed, on one occasion the Union even reminded Respondent’s representatives that it was time to leave, given the time needed to get to the airport, if they wanted to catch their flights that evening. Unlike with the scheduling of bargaining sessions, where the Union repeatedly requested, even begged, for additional or multiple bargaining dates, the Union never protested

⁴⁵ There is no evidence that Respondent failed to abide to the terms of the settlement agreement, and therefore no default judgment has been entered. The Settlement Agreement also contained a provision requiring Respondent to bargain with the Union for an extended period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

Respondent’s requests for “half-day” sessions. If, as I suspect, this was out of courtesy, perhaps in the hope that Respondent would agree to additional (or multiple) bargaining sessions, it was certainly a case of unrequited courtesy. The Board has ruled that it will not find a violation of the duty to bargain if the union does not test an employer’s willingness to bargain. *Audio Visual Services Group, Inc.*, 367 NLRB No. 103, slip op. at 6 (2019). See also *Captain’s Table*, 289 NLRB 22, 22–24 (1988); *McCarthy’s Construction Co.*, 355 NLRB 50, 53 fn. 14 (2010). Simply put, as the Board stated in *McCarthy’s Construction, Id.*, the Union should have been more assertive in requesting longer bargaining sessions, rather than acquiesce to the half-day sessions.

Accordingly, I find no merit in this allegation, and recommend that it be dismissed.⁴⁶

3. The allegation that Respondent failed and refused to engage in meaningful bargaining during sessions.⁴⁷

The above-described allegation in the complaint is puzzling and vague, partly because the definition of the word “meaningful” is uncertain, and has, to my knowledge, never been precisely defined by the Board. This is because, like “good faith” it can only be defined on a case-by-case basis, and is fact-dependent. Unfortunately, the General Counsel’s post-hearing brief did not provide much clarity as to its precise theory of a violation, providing instead a smorgasbord sample of conduct by Respondent, apparently hoping that this diffuse mass would coalesce into a unified theory of a violation.⁴⁸ Thus, in its brief, the General Counsel generally espouses 3 types of conduct by Respondent which it believes shows that Respondent failed to engage in “meaningful” bargaining. I will discuss these allegations below.

First, the General Counsel emphasizes Respondent’s alleged failure to provide the Union with information and argues this is evidence of bad faith. While this is true, it must be noted that the General Counsel has alleged that Respondent failed to engage in “meaningful” bargaining, which is another way of stating that it was engaged in surface bargaining. To establish surface bargaining, the Board looks at the totality of circumstances and conduct both on and off the table. The refusal to provide information is one among several—indeed many—factors the Board looks at. A refusal to provide information, while an independent violation of Section 8(a)(1)(5), by itself cannot serve as the basis for a finding that the employer was engaged in surface—or lack of meaningful—bargaining. The General Counsel cites several cases in support of the proposition that failure to provide information is tantamount to failing to engage in meaningful bargaining. The problem, however, is that none of the cases cited stand for this proposition or are otherwise inapposite. For example, the General Counsel cites *Chalk Metal Co., Inc.*, 197 NLRB 1133 (1972), stating that the Board adopted an ALJ’s finding that the employer’s failure to provide information supported the conclusion that it failed to engage in

⁴⁶ As discussed above, however, Respondent’s conduct in this regard is still relevant and can be used to reveal Respondent’s frame of mind and good faith (or lack thereof) with regard to the scheduling of bargaining sessions.

⁴⁷ Complaint paragraph 8(a)(iii).

⁴⁸ During the hearing, I specifically asked the General Counsel if it was alleging that Respondent engaged in surface bargaining, but I never received a satisfactory answer, with the General Counsel explaining that it would discuss its theory in its post-hearing brief. General Counsel never answered the question in the brief, either. It should be noted that the General Counsel’s “brief,” at 64 pages despite using size 11 font, was anything but.

“meaningful bargaining.” There are several things that are wrong about this assertion. First, the employer in that case did not file exceptions to the ALJ’s (actually, Trial Examiner, as they were called then) substantive findings, and only filed objections to the broad remedy recommended. Therefore, the Board did not “adopt” the ALJ’s findings or conclusions, and the case accordingly

5 does not constitute proper precedent. *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel)*, 357 NLRB 1683 fn. 1 (2011); *Colgate-Palmolive Co.*, 323 NLRB 515, fn. 1 (1997). Secondly, the ALJ never used the term “meaningful bargaining,” but rather found that the employer had independently violated Section 8(a)(5) by refusing to furnish the union with information. The ALJ found that this conduct, along with many other additional factors,

10 including fairly egregious conduct, constituted bad faith surface bargaining. Likewise, *Atlanta Hilton & Towers*, 271 NLRB 1600 (1984), cited for the proposition that failure to provide relevant information evidences bad faith bargaining, stands for no such thing. Indeed, in *Atlanta Hilton* the Board found that the employer had not violated the Act when it refused to provide the Union with certain financial information, since the employer had not plead inability to pay.

15 While the Board listed the various factors it considers when deciding if an employer was engaged in bad faith bargaining, failing to provide information was not one of them.⁴⁹ Nonetheless, failing to provide information has been found by the Board in other cases to be one of the various factor in such consideration—a factor that I already discussed in finding Respondent had engaged in dilatory scheduling practices. Finally, the General Counsel cites

20 *National Extrusion & Mfg. Co.*, 357 NLRB 127, 168 (2011), but that is a case that is simply inapposite—the Board in that case found an independent violation of Section 8(a)(1)(5) based on the employer’s failure to provide requested information, and violating that Section of the Act by definition means the employer failed to bargain in good faith. In other words, it was not a factor in finding the employer had engaged in surface bargaining, or “meaningful bargaining” as the

25 General Counsel has plead. As noted earlier, although the refusal to provide information issue was not plead or litigated in the instant case, I took judicial notice of a formal settlement agreement entered into by Respondent which resolved an earlier complaint, and such conduct was duly noted. Examining Respondent’s over-all conduct during negotiations, including its delay in providing the Union with information, as further detailed below, I am not persuaded that

30 the General Counsel has met its burden to show surface bargaining—or “meaningful bargaining”—as it apparently prefers to call this conduct.

General Counsel additionally argues that Respondent failed to engage in meaningful bargaining by refusing to submit economic proposals after a “full year” of bargaining, citing

35 *United Technologies*, 296 NLRB 571 (1999) and *Nansemond Convalescent Center*, 255 NLRB 563, 566–567 (1981). Both of those cases are distinguishable, however, in that the parties in those cases held at least twice the number of bargaining sessions (12 in *United Technologies* and 14 in *Nansemond*) than the parties in this case, which held only 6.⁵⁰ In light of the relatively few bargaining session held in this case, it is far more difficult to detect a clear pattern of refusal by

40 Respondent to make economic proposals. Simply put, the runway is much too short for General

⁴⁹ In *Atlanta Hilton*, supra., at 1603, the Board listed the following indicia of lack of good faith: delaying tactics; unreasonable bargaining demands; unilateral changes in mandatory subjects of bargaining; efforts to bypass the union; failing to designate an agent with sufficient bargaining authority; withdrawal of agreed-upon provisions; and arbitrary scheduling of meetings.

⁵⁰ As discussed earlier, the meager number of bargaining sessions can be attributable to Respondent’s dilatory tactics.

Counsel’s airplane of a theory to take off. As witnesses for both sides admitted, the parties often got “side-tracked” during some of the meetings discussing issues that were not immediately pertinent to contractual bargaining matters—but it was by mutual volition.⁵¹ More importantly, however, unlike in the two cited cases, Respondent in this case did not refuse to discuss economic proposals at all. While it cited its preference to come to agreement on non-economic matters first, it did not refuse to discuss economic matters. It rejected the economic proposals submitted by the Union, as was its right to do, and had yet to submit a counter-proposal by their sixth and last bargaining session. Given the relatively small amount of bargaining sessions the parties had, and the fact that by mutual volition they got bogged down on a number of non-economic issues during those sessions, I will not read bad faith into Respondent’s failure to submit economic counter proposals during that short span of time.

In sum, I find that the over-all record in this instance does not show that Respondent failed to engage in “meaningful bargaining,” or put in another way, that it engaged in surface bargaining.

4. The allegation that Respondent failed and refused to come to bargaining sessions with prepared proposals.

This allegation is the most puzzling of all, because it implies, or presumes, that there is an obligation under Section 8(d) of the Act for a party to negotiations to come to any given bargaining session with pre-prepared proposals or counter-proposals—something that to my knowledge the Board or a court has never directly, indirectly, or even remotely ever ruled.⁵² Moreover, it is based on a factual premise which is not established, as discussed below. This allegation appears to again be based on a smorgasbord of diffuse concepts, such as Respondent not presenting a counter-proposal first thing in the morning at a new session after the Union made a proposal in the last session, or Respondent taking too long to caucus, or allegedly using caucus time to prepare counter-proposals it should have already prepared prior to the session, etc. Again, the merit of these allegations assumes that there is a rigid set of rules governing negotiations, where any proposal by one side must be, if not immediately thereafter, soon be countered by the other side, within a specific time table, and caucusing time is not permitted to be used for the preparation of proposals—which must have been prepared beforehand, like school kids’ homework. For example, the General Counsel cites the fact that the Union presented Respondent with a full contractual proposal at the March 29 session, which the parties discussed at length during that session. The General Counsel goes on to assert that Respondent, instead of presenting its counter-proposal at the start of the May 1 session, did not do so until late during the May 1 session, and implies that Respondent misused a lengthy caucus during that

⁵¹ In this regard, I take issue with the General Counsel pointing out that the parties spent an entire bargaining session (on February 9) and part of the next one, negotiating—or arguing—about the “ground rules,” which the Union had proposed. The silent implication is that this waste of time was Respondent’s fault, who the General Counsel apparently assumes should have simply accepted whatever the Union had proposed. This implication is exceedingly invalid. The Union opened the door by proposing ground rules, and Respondent had the right to disagree with the Union’s proposals and bargain—and bargain *hard* if need be—about these rules. Accordingly, even if the parties had spent several sessions discussing this topic, I would not find it a valid basis for implying bad faith on Respondent’s part, absent other conduct evidencing bad faith.

⁵² Indeed, the General Counsel offers no authority in its post-hearing brief as why this allegation, even if true, would violate the Act.

session to prepare its counter-proposal. First, I note that Respondent presented evidence, which I credited, that it had in fact prepared its counter-proposal prior to May 1, but that the parties ended up getting side-tracked and discussing other issues at the start of the May 1 session. It is therefore inaccurate to assert that Respondent was coming to the bargaining sessions

5 “unprepared,” whatever that means. Even assuming, however, that Respondent intentionally held on to its counter-proposal until later in the bargaining session, or even prepared such proposal belatedly during a caucus, I cannot imagine a theory, let alone find authority, under which such conduct could be found unlawful. Bargaining is not governed by a rigid “tit-for-tat” set of procedural rules, but must rather be judged by the over-all conduct of the parties to
10 determine good faith. *Port Plastics*, 279 NLRB 362, 382 (1986); *Hotel Roanoke*, 293 NLRB 182, 184 (1989). The reality is that bargaining often resembles poker, where the opponents sometimes hold their cards until it is most strategically advantageous to show them. A skilled negotiator—indeed a brilliant one—is one who without resorting to a rigid and unlawful lack of flexibility or lack of reasonable concessions, can coax the other side into bargaining against
15 itself. The Act presumes that negotiating parties are adults who can be assertive, push the other side and demand a response when called for. (see, e.g., *Audio Visual Services Group, Inc.*, supra., 367 NLRB No. 103, slip op. at 8 (2019)). The Act does not contemplate the Board as a referee, let alone a baby-sitter, when it comes to bargaining between parties, but rather designates it as an adjudicator which determines if a party has crossed the line into bad faith.
20 Such line has not been crossed in this particular scenario.

Accordingly, and for the above reasons, I find no merit in this allegation.

- 25 5. The allegation that Respondent insisted on claiming the Union is a competitor despite Board decisions finding it to be a labor organization.

Again, this allegation is somewhat puzzling, because it suggests that by sustaining or maintaining an opinion that is contrary to established Board precedent, this shows bad faith and
30 is therefore violative of the Act. The short answer to that is that Respondent is constitutionally entitled to hold any opinion it wishes, despite any Board or court rulings to the contrary. The issue is not what opinion Respondent maintained, regardless of how invalid, silly or odious it might be, but rather what conduct, if any, such opinion engendered. In this case, Respondent’s repeated assertions during the course of negotiations that the Union was a “competitor” of
35 Respondent resulted in the withholding of certain information from the Union for over 6 months. Thus, the Union had requested that Respondent provide it, inter alia, with the name of the venues or locations where its riggers worked. Respondent balked, claiming that it considered such information “proprietary and confidential” and that providing such information to the Union, which Respondent considered a “competitor,” could prove harmful to its business interests. This
40 resulted in protracted negotiations between the Union and Respondent, who insisted that the Union enter into a confidentiality agreement before such information was released. The parties eventually came to an agreement on this issue, and the information was eventually provided to the Union—albeit more than 6 months after it had been requested.⁵³ In sum, Respondent’s

⁵³ In any event, pursuant to the terms of the settlement agreement Respondent entered into in Case 19–CA–213768, discussed above, it would appear that Respondent would have been obligated to provide such information in any event.

conduct in this regard resulted in an unwarranted delay in providing the Union with information it was entitled to, and which it needed to properly represent the employees it represented in collective bargaining.

Accordingly, to the extent that the General Counsel alleges that by holding or even expressing its view that the Union was a “competitor” Respondent displayed bad faith or otherwise violated the Act, I would find no merit to this allegation. On the other hand, if the allegation is that as a result of this view Respondent engaged in conduct such as delaying providing the Union with information it was entitled to, I find that the allegation has merit. Such conduct, as I already discussed earlier in discussing allegation No. 1, above, is one of the various factors I considered in concluding that Respondent had engaged in dilatory tactics that supported a finding of bad faith bargaining.

B. The Unilateral Implementation of the Safety Boots Policy

As described in the facts Section, it is undisputed that starting on January 1, 2018, Respondent implemented a new policy that made it mandatory for riggers to wear over-the-ankle safety boots containing steel or composite toe guards.⁵⁴ This new policy was in effect until July 5, 2018, when Respondent rescinded the rule after the Union raised objections. It is also undisputed that Respondent never notified the Union about the new rule or bargained with the Union prior to implementing it. The record also shows that although Respondent’s prior policy required riggers to wear “boots,” which typically is understood to mean over-the-ankle foot ware, this policy was not rigidly adhered to or enforced, as some riggers, particularly “up-riggers” who worked in heights, preferred wearing lighter footwear with better grip, such as tennis shoes. Respondent’s new policy required riggers to wear over-the-ankle boots with protective (steel or composite) toe protection, which employees would have to purchase if they did not already own such footwear. The record further shows that the cost of such footwear would be anywhere from \$35 to over \$100, depending on the brand and style.

The General Counsel contends the employer’s change in policy without notifying or bargaining with the Union violated Section 8(a)(1)(5) of the Act, pursuant to the well-established doctrine announced by the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962). Respondent, citing *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), as well as *Bath Iron Works Corp.*, 302 NLRB 898 (1991), contends that the new policy was consistent with Respondent’s past practice, and that in any event the change was minor and not material substantial or sufficiently significant so as to trigger an obligation to bargain. For the reasons discussed below, I find that the General Counsel has the better argument, and that this unilateral change violated Section 8(a)(1)(5) of the Act.

It is by now axiomatic that Section 8(a)(5) of the Act requires an employer to provide its employees’ representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory subject of bargaining, such as wages, hours and other terms and conditions of employment. *NLRB v. Katz*, supra. A unilateral change in a mandatory subject of bargaining is unlawful only, however, if it is a “material, substantial, and significant

⁵⁴ The new policy also stated that those employees who were not complying with this policy would be sent home.

change.” *Berkshire Nursing Home*, 345 NLRB 220 (2005); *Toledo Blade*, 343 NLRB 385 (2004); *Flambeau Airmold Corp.*, 334 NLRB 165 (2001), quoting *Alamo Cement Co.*, 281 NLRB 737, 738 (1986), modified on other grounds 337 NLRB 1025 (2002). The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union. The burden is then on the employer to show that the unilateral change was in some way privileged. *McClatchy Newspapers, Inc.*, 339 NLRB 1214 (2003), and cases cited therein. I find that not only a change took place in the instant case, but that such change was material, substantial and significant. The new policy required employees who did not already have over-the-ankle boots with toe guards to purchase such footwear, which could exceed \$100, and provided that those in non-compliance would be sent home from work. While the record is silent as to how many employees ended up having to purchase new foot ware to comply with the new policy, it is reasonable to infer that it involved more than a handful, since the record established that some employees, such as up-riggers, did not wear boots under the old policy. I therefore do not consider this change to be de minimis, as Respondent appears to argue. Moreover, I do not believe that *Raytheon*, supra., is applicable to this situation. *Raytheon* involved a very fact-specific situation concerning an employer making modifications to medical benefits after the expiration of a collective-bargaining agreement, modifications which the Board found to be consistent with past practices by the employer. At its essence, *Raytheon* stands for the proposition that certain modifications or alterations consistent with past permitted practice under collective-bargaining agreements do not constitute a *change* within the meaning of *NLRB v. Katz*, supra. In the instant case, I have found that a significant and material change took place and note that Respondent did not meet its burden under *McClatchy* to show that this change was privileged. Indeed, I would note that most, if not all, employers have work rules and policies in place long before the advent of a union’s arrival—workplaces could not function otherwise—and that occasionally these rules and policies undergo changes. To apply *Raytheon* in such a broad manner so as to cover all preexisting rules and policies, under these circumstances, would all but wipe out the significance of *Katz*, which respectfully, the Board lacks the authority to do. I therefore do not interpret *Raytheon* in the manner Respondent would have me do.

Accordingly, I conclude that by implementing the new work (or safety) boots policy on January 1, 2018, without notifying or bargaining with the Union, Respondent violated Section 8(a)(1)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Rhino Northwest, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, AFL–CIO, CLC (Union), is a labor organization within the meaning of Section 2(5) of the Act and has at all times material herein been the certified exclusive representative for purposes of collective bargaining of Respondent’s employees in the following described unit:

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the Act.

3. Respondent has violated Section 8(a)(5) and (1) of the Act from February 9, 2018 through October 11, 2018, by failing and refusing to bargain with the Union in good faith and by failing to meet with the Union at reasonable times for the purposes of collective bargaining.

4. Respondent has violated Section 8(a)(5) and (1) of the Act from January 1, 2018 through July 5, 2018 by unilaterally implementing a new safety work boot policy without notifying or bargaining with the Union.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the Section 8(a)(5) & (1) violations I have found is an order requiring Respondent Rhino Northwest LLC to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

I shall recommend that Respondent be ordered, on request, to bargain with the Union over wages, hours, and working conditions of employees in the above-described unit and, if agreement is reached, embody such agreement in writing. This obligation shall include complying with the Union's requests for more frequent in-person bargaining sessions.⁵⁵ I shall further recommend that that Respondent be ordered to cease and desist from implementing changes in the working conditions of bargaining unit employees without first affording the Union the opportunity to bargain. I shall also recommend, pursuant to the Board's ruling in *Mar-Jac Poultry Co.*, 136 NLRB 785, 785–787 (1962), an extension of the certification year for a 10-month period to commence from the time Respondent first begins to bargain in good faith with the Union. Additionally, Respondent will be required to post a notice to employees, assuring them that Respondent will not violate their rights in this or any other related manner in the future. Given the geographically disperse nature of Respondent's work force, Respondent shall also be required to distribute the notice to employees by email or regular mail, as well as any other means Respondent customarily uses to communicate with employees.

⁵⁵ The General Counsel has requested a special remedy requiring Respondent to adhere to a bargaining schedule setting forth regular intervals and hours for bargaining with the Union, without specifying exactly what that schedule should consist of, and further requiring that Respondent prepare written bargaining progress reports every 15 days to be submitted to the Regional Director and the Union. I note, however, that the cases relied upon by General Counsel to justify this extraordinary remedy involved conduct that was far more extensive, egregious and widespread than the conduct engaged in by Respondent in this case. Accordingly, I decline to order such remedy.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁵⁶

ORDER

Respondent, Rhino Northwest LLC, Fife Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by failing to meet with the Union at reasonable times for the purposes of collective bargaining;

(b) Failing and refusing to bargain with the Union by unilaterally implementing a new safety work boot policy without notifying or bargaining with the Union;

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Within 14 days after service by the Region, post at all its facility in Fife, Washington, where notices to employees are customarily posted, copies of the attached notice marked “Appendix.”⁵⁷ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, or by regular U.S. mail for those employees who do not have email. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2018.

⁵⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵⁷ If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(b) Within 21 days after service by the Region, file with the Regional Director for Region 19, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated: Washington, D.C. October 28, 2019

A handwritten signature in blue ink, appearing to read "Ariel L. Sotolongo", written over a horizontal line.

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Ariel L. Sotolongo
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT fail and refuse to bargain with Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, AFL–CIO, CLC (Union) in good faith by failing to meet with the Union at reasonable times for the purposes of collective bargaining.

WE WILL NOT implement any changes in the wages, hours, or working conditions of our bargaining unit employees, including implementing a new work (or safety) boot policy, without first notifying the Union and giving it an opportunity to bargain.

WE WILL, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit concerning terms and conditions of employment:

All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of its Fife, Washington, facility, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of rights listed above.

RHINO NORTHWEST LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/19-CA-221309 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (206) 220-6340.